



Billing Code: 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2011-0726; FRL-9813-1]

**Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 1997 and 2006 PM<sub>2.5</sub> National Ambient Air Quality Standards; Prevention of Significant Deterioration Requirements for PM<sub>2.5</sub> Increments and Major and Minor Source Baseline Dates; State Board Requirements; North Dakota**

**AGENCY:** Environmental Protection Agency (EPA)

**ACTION:** Proposed rule

**SUMMARY:** EPA is proposing to approve the State Implementation Plan (SIP) submission from the State of North Dakota to demonstrate that the SIP meets the infrastructure requirements of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for particulate matter less than or equal to 2.5 micrometers ( $\mu\text{m}$ ) in diameter (PM<sub>2.5</sub>) on July 18, 1997 and on October 17, 2006. The CAA requires that each state, after a new or revised NAAQS is promulgated, review their SIP to ensure that it meets the requirements of the “infrastructure elements” necessary to implement the new or revised NAAQS. On May 25, 2012, North Dakota submitted a certification of their infrastructure SIP for the 1997 PM<sub>2.5</sub> NAAQS. On August 12, 2010 and May 22, 2012, North Dakota submitted certifications of their infrastructure SIP for the 2006 PM<sub>2.5</sub> NAAQS. We are also proposing to approve two submissions from North Dakota that revise the SIP to address particular infrastructure elements. First, the State submitted revisions to the North Dakota Air Pollution Control Rules (NDAC) on

January 24, 2013 that will update the Prevention of Significant Deterioration (PSD) program by adopting by reference federal provisions as they exist as of January 1, 2012, which reflect the requirements of the 2010 PM<sub>2.5</sub> Increment Rule. Second, on April 2, 2013, the State submitted revisions to the section of the SIP concerning state boards. EPA will act separately on certain requirements of the CAA relating to interstate transport of air pollution for the 2006 PM<sub>2.5</sub> NAAQS.

**DATES:** Written comments must be received on or before **[Insert date 30 days after publication in the Federal Register]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R08-OAR-2011-1726, by one of the following methods:

- <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- E-mail: [ayala.kathy@epa.gov](mailto:ayala.kathy@epa.gov)
- Fax: (303) 312-6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- Mail: Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mail Code 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129.
- Hand Delivery: Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mail Code 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R08-OAR-2011-0726.

EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through [www.regulations.gov](http://www.regulations.gov) your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. For additional instructions on submitting comments, go to section I, General Information, of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other

information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Kathy Ayala, Air Program, U.S.

Environmental Protection Agency (EPA), Region 8, Mail Code 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6142, [ayala.kathy@epa.gov](mailto:ayala.kathy@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **Definitions**

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- (i) The words or initials Act or CAA mean or refer to the Clean Air Act, unless the context indicates otherwise.
- (ii) The initials CBI mean or refer to confidential business information.
- (iii) The word Department means or refers to the North Dakota Department of Health.
- (iv) The words EPA, we, us or our mean or refer to the United States Environmental Protection Agency.
- (v) The initials FIP mean or refer to a Federal Implementation Plan.
- (vi) The initials GHG mean or refer to greenhouse gases.

- (vii) The initials NAAQS mean or refer to national ambient air quality standards.
- (viii) The initials NDAC mean or refer to the North Dakota Air Pollution Control Rules.
- (ix) The initials NDCC mean or refer to the North Dakota Century Code.
- (x) The initials NO<sub>x</sub> mean or refer to nitrogen oxides.
- (xi) The initials NSR mean or refer to new source review.
- (xii) The initials PM mean or refer to particulate matter.
- (xiii) The initials PM<sub>2.5</sub> mean or refer to particulate matter with an aerodynamic diameter of less than 2.5 micrometers (fine particulate matter).
- (xiv) The initials ppm mean or refer to parts per million.
- (xv) The initials PSD mean or refer to Prevention of Significant Deterioration.
- (xvi) The initials SIP mean or refer to State Implementation Plan.
- (xvii) The initials SSM mean or refer to start-up, shutdown, or malfunction.

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- I. General Information**

What should I consider as I prepare my comments for EPA?

1. Submitting Confidential Business Information (CBI). Do not submit CBI to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for preparing your comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register, date, and page number);
- Follow directions and organize your comments;
- Explain why you agree or disagree;
- Suggest alternatives and substitute language for your requested changes;
- Describe any assumptions and provide any technical information and/or data that you used;
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced;
- Provide specific examples to illustrate your concerns, and suggest alternatives;
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats; and,

- Make sure to submit your comments by the comment period deadline identified.

## **II. Background**

On July 18, 1997, EPA promulgated new NAAQS for particulate matter less than or equal to 2.5 micrometers ( $\mu\text{m}$ ) in diameter ( $\text{PM}_{2.5}$ ). Two new  $\text{PM}_{2.5}$  standards were added, set at  $15\ \mu\text{g}/\text{m}^3$ , based on the 3-year average of annual arithmetic mean  $\text{PM}_{2.5}$  concentration from single or multiple community-oriented monitors, and  $65\ \mu\text{g}/\text{m}^3$ , based on the 3-year average of the 98<sup>th</sup> percentile of 24-hour  $\text{PM}_{2.5}$  concentrations at each population-oriented monitor within an area. In addition, the 24-hour  $\text{PM}_{10}$  standard was revised to be based on the 99<sup>th</sup> percentile of 24-hour  $\text{PM}_{10}$  concentration at each monitor within an area (62 FR 38652).

On October 17, 2006 EPA promulgated a revised NAAQS for  $\text{PM}_{2.5}$ , tightening the level of the 24-hour  $\text{PM}_{2.5}$  standard to  $35\ \mu\text{g}/\text{m}^3$  and retaining the level of the annual  $\text{PM}_{2.5}$  standard at  $15\ \mu\text{g}/\text{m}^3$ . EPA also retained the 24-hour  $\text{PM}_{10}$  standard and revoked the annual  $\text{PM}_{10}$  standard (71 FR 61144).

By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised standard. Section 110(a)(2) provides basic requirements for SIPs, including emissions inventories, monitoring, and modeling, to assure attainment and maintenance of the standards. These requirements are set out in several “infrastructure elements,” listed in section 110(a)(2).

Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, and the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission.

The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 and 2006 PM<sub>2.5</sub> NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous NAAQS.

### **III. What is the Scope of this Rulemaking?**

This rulemaking will not cover four substantive issues that are not integral to acting on a state's infrastructure SIP submission: (1) existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions ("SSM"); (2) existing provisions related to "director's variance" or "director's discretion" that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA ("director's discretion"); (3) existing provisions for minor source NSR programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs ("minor source NSR"); and, (4) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) ("NSR Reform"). Instead, EPA has indicated that it has other authority to address any such existing SIP defects in other rulemakings, as appropriate. A detailed rationale for why these four substantive issues are not part of the scope of infrastructure SIP rulemakings can be found in EPA's July 13, 2011, final rule entitled, "Infrastructure SIP Requirements for the 1997 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards" in the section entitled, "What Is The Scope Of This Final Rulemaking?" (see 76 FR 41075 at 41076 – 41079).



#### **IV. What Infrastructure Elements are Required under Sections 110(a)(1) and (2)?**

Section 110(a)(1) provides the procedural and timing requirements for SIP submissions after a new or revised NAAQS is promulgated. Section 110(a)(2) lists specific elements the SIP must contain or satisfy. These infrastructure elements include requirements such as modeling, monitoring, and emissions inventories, which are designed to assure attainment and maintenance of the NAAQS. The elements that are the subject of this action are listed below.

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.
- 110(a)(2)(D): Interstate transport.
- 110(a)(2)(E): Adequate authority, conflict of interest, and oversight of local governments and regional agencies.
- 110(a)(2)(F): Stationary source monitoring and reporting.
- 110(a)(2)(G): Emergency powers.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

A detailed discussion of each of these elements is contained in the next section. Element 110(a)(2)(D)(i)(I), Interstate transport of pollutants which contribute significantly to nonattainment in, or interfere with maintenance by, any other state will be acted upon in a separate action.

Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) and are therefore not addressed in this action. These elements relate to part D of Title I of the CAA, and submissions to satisfy them are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the same time nonattainment area plan requirements are due under section 172. The two elements are: (1) section 110(a)(2)(C) to the extent it refers to permit programs (known as “nonattainment new source review (NSR)”) required under part D, and (2) section 110(a)(2)(I), pertaining to the nonattainment planning requirements of part D. As a result, this action does not address infrastructure elements related to the nonattainment NSR portion of section 110(a)(2)(C) or related to 110(a)(2)(I).

## **V. How Did North Dakota Address the Infrastructure Elements of Sections 110(a)(1) and (2)?**

1. **Emission limits and other control measures:** Section 110(a)(2)(A) requires SIPs to include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of the Act.

a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub>

submissions cite provisions of the North Dakota Air Pollution Control Rules (NDAC), Chapter 33-15, which establishes control requirements for particulate matter and PM<sub>2.5</sub> precursors. In addition, the State cites the North Dakota Century Code (NDCC), Chapter 23-25, Air Pollution Control, in Section 23-25-03 which provides the general authority to regulate sources of PM<sub>2.5</sub>.

b. **EPA analysis:** First, this infrastructure element does not require the submittal of regulations or emission limitations developed specifically for attaining the 1997 and 2006 PM<sub>2.5</sub> NAAQS, and North Dakota has no areas designated as nonattainment for the 1997 and 2006 PM<sub>2.5</sub> NAAQS. Nonetheless, the North Dakota SIP contains provisions for control of particulate matter (NDAC 33-15-05). The State also regulates emissions of PM<sub>2.5</sub> and its precursors through the SIP-approved PSD and minor NSR programs. This suffices, in the case of North Dakota, to meet the requirements of section 110(a)(2)(A) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

2. **Ambient air quality monitoring/data system:** Section 110(a)(2)(B) requires SIPs to provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to "(i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator."

a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite the NDCC 23-25-03 which provides the authority for the North Dakota Department of Health (Department) to conduct ambient air monitoring. In addition, the State cites the Annual Network Monitoring Plans for 2009 and 2011 which provide for an ambient air quality monitoring system in the State.

b. **EPA analysis:** North Dakota's air monitoring program and data systems meet the requirements of CAA section 110(a)(2)(B) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS. The North

Dakota Division of Air Quality's (DAQ) 2012 Ambient Air Annual Monitoring Network Plan was received by EPA on February 14, 2013 and approved on April 4, 2013. The plan meets current requirements for monitoring of PM<sub>2.5</sub>.

3. **Program for enforcement of control measures:** Section 110(a)(2)(C) requires SIPs to include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that NAAQS are achieved, including a permit program as required in parts C and D.

a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite the NDAC, chapters 33-15-14-02 (Permit to Construct), 33-15-15 (PSD), 33-15-14-03 (Minor Source Permit to Operation), and 33-15-14-06 (Title V Permit to Operate). In addition the State cites NDCC 23-25-03.6 and 23-25-04.1, which authorizes the State permitting programs.

b. **EPA analysis:** To generally meet the requirements of section 110(a)(2)(C), the State is required to have SIP-approved PSD, nonattainment NSR, and minor NSR permitting programs adequate to implement the 1997 and 2006 PM<sub>2.5</sub> NAAQS. As explained above, in this action EPA is not evaluating nonattainment related provisions, such as the nonattainment NSR program required by part D of the Act. EPA is evaluating the State's PSD program as required by part C of the Act, and the State's minor NSR program as required by 110(a)(2)(C).

#### PSD Requirements

North Dakota has a SIP-approved PSD program that meets the general requirements of part C of the Act (51 FR 31125). To satisfy the particular requirements of section 110(a)(2)(C),

states should have a PSD program that applies to all regulated NSR pollutants, including greenhouse gases (GHGs). See 40 CFR 51.166(b)(48) and (b)(49). The PSD program should reflect current requirements for these pollutants. In particular, for three pollutants—ozone, PM<sub>2.5</sub>, and GHGs—there are additional regulatory requirements (set out in portions of 40 CFR 51.166) that we consider in evaluating North Dakota's PSD program. In the rulemakings in which EPA revised the requirements in 40 CFR 51.166 for these pollutants, EPA also updated the federal PSD program at 40 CFR 52.21 accordingly. North Dakota implements the PSD program by, for the most part, incorporating by reference the federal PSD program as it existed on a specific date. The State periodically updates the PSD program by revising the date of incorporation by reference and submitting the change as a SIP revision. As a result, the SIP revisions generally reflect changes to PSD requirements that EPA has promulgated prior to the revised date of incorporation by reference.

In particular, on June 3, 2010 (75 FR 31291), we approved a North Dakota SIP revision that revised the date of incorporation by reference of the federal PSD program to August 1, 2007. That revision addressed the PSD requirements of the Phase 2 Ozone Implementation Rule promulgated in 2005 (70 FR 71612). As a result, the approved North Dakota PSD program meets current requirements for ozone.

Similarly, on October 23, 2012 (77 FR 64736), we approved a North Dakota SIP revision that revised the date of incorporation by reference of the federal PSD program to July 2, 2010. As explained in the notice for that action, that revision addressed the PSD requirements related to GHGs provided in EPA's June 3, 2010 "Prevention of Significant Deterioration and Title V

Greenhouse Gas Tailoring Rule" (75 FR 31514). The approved North Dakota PSD program thus also meets current requirements for GHGs.

For PM<sub>2.5</sub>, EPA has promulgated two relevant rules. The first, promulgated in 2008, addresses (among other things) treatment of PM<sub>2.5</sub> precursors in PSD programs. The second, promulgated in 2010, establishes (among other things) increments for PM<sub>2.5</sub>. As we discuss next, both rules have been the subject of recent litigation.

On January 4, 2013, the U.S. Court of Appeals, in Natural Resources Defense Council v. EPA, 706 F.3d 428 (D.C. Cir. 2013), issued a judgment that remanded EPA's 2007 and 2008 rules implementing the 1997 PM<sub>2.5</sub> NAAQS. The court ordered EPA to "repromulgate these rules pursuant to Subpart 4 consistent with this opinion." Id. at 437. Subpart 4 of Part D, Title 1 of the CAA establishes additional provisions for particulate matter nonattainment areas.

The 2008 implementation rule addressed by the court decision, "Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>)," (May 16, 2008, 73 FR 28321), promulgated NSR requirements for implementation of PM<sub>2.5</sub> in nonattainment areas (nonattainment NSR) and attainment/unclassifiable areas (PSD). As the requirements of Subpart 4 only pertain to nonattainment areas, EPA does not consider the portions of the 2008 rule that address requirements for PM<sub>2.5</sub> attainment and unclassifiable areas to be affected by the court's opinion. Moreover, EPA does not anticipate the need to revise any PSD requirements promulgated in the 2008 rule in order to comply with the court's decision. Accordingly, EPA's approval of North Dakota's infrastructure SIP as to elements (C), (D)(i)(II), or (J) with respect to the PSD requirements promulgated by the 2008 implementation rule does not conflict with the court's opinion.

The court's decision with respect to the nonattainment NSR requirements promulgated by the 2008 implementation rule also does not affect EPA's action on the present infrastructure action. EPA interprets the Act to exclude nonattainment area requirements, including requirements associated with a nonattainment NSR program, from infrastructure SIP submissions due 3 years after adoption or revision of a NAAQS. Instead, these elements are typically referred to as nonattainment SIP or attainment plan elements, which would be due by the dates statutorily prescribed under subpart 2 through 5 under part D, extending as far as 10 years following designations for some elements.

As mentioned above, EPA previously approved a North Dakota SIP revision that revised the date of incorporation by reference of the federal PSD program to July 2, 2010. This SIP revision also addressed the requirements of the 2008 PM<sub>2.5</sub> NSR implementation rule. See 77 FR 64736. The remaining PSD requirement for PM<sub>2.5</sub> is contained in EPA's October 20, 2010 rule, "Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)" (75 FR 64864). EPA regards adoption of the PM<sub>2.5</sub> increments as a necessary requirement when assessing a PSD program for the purposes of element (C).

The PM<sub>2.5</sub> increments have not been approved into North Dakota's SIP, as the last approved date of incorporation by reference of the federal PSD program is July 2, 2010, prior to promulgation of the PM<sub>2.5</sub> increments. The State of North Dakota submitted revisions to chapter 33-15-15-01.2, Scope, of the NDAC on January 24, 2013 that adopt the PM<sub>2.5</sub> increments by incorporating by reference the federal PSD program at 40 CFR part 52, section 21, as it existed on January 1, 2012.

We propose to approve portions of the January 24, 2013 submittal that are necessary to incorporate the increments into the SIP. Specifically, we propose to approve the incorporation by reference of 40 CFR part 52, section 21, paragraphs (b)(14)(i), (ii), (iii), (b)(15)(i), (ii), and paragraph (c) as those paragraphs existed on January 1, 2012. These paragraphs provide the major source baseline date, the minor source baseline date, and the increments for PM<sub>2.5</sub>. At this time we are not proposing to act on any other portions of the January 24, 2013 submittal, including the incorporation by reference of SILs and SMCs for PM<sub>2.5</sub>.

With the partial approval of the January 24, 2013 submittal, the North Dakota PSD program will meet current requirements for all regulated NSR pollutants. As a result, we also propose to approve the North Dakota infrastructure SIP for element (C) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS with respect to PSD requirements.

#### Minor NSR

The State has a SIP-approved minor NSR program, adopted under section 110(a)(2)(C) of the Act. The State and EPA have relied on the State's existing minor NSR program to assure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS.

In this action, EPA is proposing to approve North Dakota's infrastructure SIP for the 1997 and 2006 PM<sub>2.5</sub> NAAQS with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the State's existing minor NSR program itself to the extent that it may be inconsistent with EPA's regulations governing this program. A number of states may have minor NSR



provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

4. **Interstate Transport:** Section 110(a)(2)(D)(i) is subdivided into four "prongs," two under 110(a)(2)(D)(i)(I) and two under 110(a)(2)(D)(i)(II). The two prongs under 110(a)(2)(D)(i)(I) require SIPs to contain adequate provisions to prohibit emissions that (prong 1) contribute significantly to nonattainment in any other state with respect to any such national primary or secondary NAAQS, or (prong 2) interfere with maintenance by any other state with respect to the same NAAQS. The two prongs under 110(a)(2)(D)(i)(II) require SIPs to contain adequate provisions to prohibit emissions that interfere with measures required to be included in the applicable implementation plan for any other state under part C (prong 3) to prevent significant deterioration of air quality, or (prong 4) to protect visibility. As noted, we are not acting on the requirements of section 110(a)(2)(D)(i)(I) (prongs 1 and 2), or the visibility requirement (prong 4) of section 110(a)(2)(D)(i)(II) in this proposed rulemaking.

a. **North Dakota's response to this requirement:** The State's 2006 PM<sub>2.5</sub> submission<sup>1</sup> addressing interstate transport cites NDAC chapters 33-15-15 (PSD), 33-15-19 (Visibility Protection), 33-15-25 (Regional Haze Requirements), SIP Section 7.8 (Interstate Transport of

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<sup>1</sup> EPA has already taken final action on prong 3 of section 110(a)(2)(D)(i) for the 1997 PM<sub>2.5</sub> NAAQS. See 75 FR 31290.

Air Pollution), and the North Dakota SIP for Regional Haze (February 24, 2010). In addition, the State cites NDCC 23-25-03 which provides the authority for the Department to conduct an air quality control program.

b. **EPA Analysis:** With regard to the PSD portion of section 110(a)(2)(D)(i)(II), this requirement may be met by the State's confirmation in an infrastructure SIP submission that new major sources and major modifications in the State are subject to a PSD program meeting all the relevant requirements of part C of title I of the CAA or (if the state contains a nonattainment area for the relevant pollutant) to a NNSR program that implements the 2006 PM<sub>2.5</sub> NAAQS. As discussed in more detail with respect to section 110(a)(2)(C), with approval of the PM<sub>2.5</sub> increments, North Dakota's SIP will contain a PSD program that reflects the relevant PSD requirements. Accordingly, in this action EPA is proposing to approve the infrastructure SIP submission as meeting the applicable requirements of prong 3 of section 110(a)(2)(D)(i).

5. **Interstate and International transport provisions:** Section 110(a)(2)(D)(ii) requires that each SIP shall contain adequate provisions insuring compliance with applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement).

a. **North Dakota's response to this requirement:** The North Dakota PSD rules provide for notifying neighboring states whose land may be significantly affected by emissions from a new or modified source. NDAC 33-15-15-01.2(q)(2)(d) states:

NDAC-33-15-15-01.2(q)(2)(d)- Send a copy of the notice required in subparagraph c to the applicant, the United States environmental protection agency administrator, and to officials and agencies having cognizance over the location where the source or

modification will be situated as follows: the chief executive of the city and county where the source or modification would be located; any comprehensive regional land use planning agency; and any state, federal land manager, or Indian governing body whose lands may be significantly affected by emissions from the source or modification.

Similar notification requirements are provided for minor sources under NDAC 33-15-14-02.6.b(4).

All PSD permit applications are provided to EPA within thirty days of receipt. This includes sources that could affect air quality in Canada. The draft PSD permits, the Air Quality Effects Analyses and the final permits are also submitted to EPA.

b. **EPA Analysis:** Section 126(a) of the CAA requires notification to affected, nearby states of major proposed new (or modified) sources. Sections 126(b) and (c) pertain to petitions by affected states to the Administrator regarding sources violating the “interstate transport” provisions of section 110(a)(2)(D)(i). Section 115 of the CAA similarly pertains to international transport of air pollution.

With regard to section 126(a), North Dakota’s SIP-approved PSD program requires notice of proposed new sources or modifications to states whose lands may be significantly affected by emissions from the source or modification (see NDAC 33-15-15-01.2(q)(2)(d)). This provision satisfies the notice requirement of section 126(a).

North Dakota has no pending obligations under sections 126(c) or 115(b); therefore, its SIP currently meets the requirements of those sections. The SIP therefore meets the requirements of 110(a)(2)(D)(ii) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

6. **Adequate resources and authority:** Section 110(a)(2)(E) requires states to provide

"(i) necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out the SIP (and is not prohibited by any provision of federal or state law from carrying out the SIP or portion thereof)" and "(iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any SIP provision, the state has responsibility for ensuring adequate implementation of such SIP provision."

a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite the NDAC 33-15-23 (regulatory mechanism for paying fees), the NDCC 23-25-04.2 (statutory for collecting fees), and the NDCC 23-25-03 (authority to carry out the requirements of the SIP). Resources for the operation of the air pollution control program are addressed in Section 9 of the SIP (updated April 2009) and the State references section 2.11 of the SIP which addresses legal authority by the Department to collect fees necessary to implement the program.

b. **EPA Analysis:** North Dakota's SIP meets the requirements of section 110(a)(2)(E)(i) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS. The NDCC 23-25-04 provides adequate authority for the State of North Dakota to carry out its SIP obligations with respect to the 1997 and 2006 PM<sub>2.5</sub> NAAQS. The State receives sections 103 and 105 grant funds through its Performance Partnership Grant along with required state matching funds to provide funding necessary to carry out North Dakota's SIP requirements.

Finally, with respect to section 110(a)(2)(E)(iii), North Dakota has not assigned responsibility for carrying out portions of the SIP to any local government, agency, or other instrumentality. North Dakota's SIP therefore meets the requirements for this element.

7. **State boards:** Section 110(a)(2)(E)(ii) requires that the state comply with the requirements respecting state boards under section 128.

a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite the NDCC 23-01-05 (statutory duties of the State Health Officer). In North Dakota there are no boards or bodies that approve permits or enforcement orders.

b. **EPA Analysis:**

On September 17, 2012, EPA conditionally approved North Dakota's infrastructure SIP for 110(a)(2)(E)(ii) for the 1997 ozone NAAQS (77 FR 57029). North Dakota committed to submit within one year a SIP revision to address the requirements of section 128 of the Act. On April 8, 2013, EPA received a submittal from the State that revises language in SIP chapter 2, section 15, Respecting Boards to include provisions for addressing conflict of interest requirements. We propose to approve that submittal and we correspondingly propose to approve the infrastructure SIP for 110(a)(2)(E)(ii) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

Section 128 of the Act provides in relevant part:

(a) Not later than the date one year after August 7, 1977, each applicable implementation plan shall contain requirements that—

(1) Any board or body which approves permits or enforcement orders under [this Act] shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under [this Act], and

(2) Any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.

As explained in detail in our April 16, 2012 proposal (77 FR 22547) for North Dakota's infrastructure SIP for the 1997 ozone NAAQS, EPA interprets subsection 128(a)(1) to apply only to states that have a board or body with multiple members that, among its duties, approves permits or enforcement orders under the Act. In North Dakota, there is no such multi-member board or body. As a result, North Dakota did not need to submit any provisions to address the requirements of section 128(a)(1).

However, EPA interprets subsection 128(a)(2) to apply to all states, regardless of whether the state has a multi-member board that approves permits or enforcement orders. As a result, 128(a)(2) applies to North Dakota, and, as also explained in the April 16, 2012 proposal, must be met through SIP-approved, federally enforceable provisions.

North Dakota's April 8, 2013 submittal fulfills the commitment made as part of our previous conditional approval for the 1997 ozone NAAQS. The submittal provides disclosure requirements that apply to any person that approves permits or enforcement orders under North Dakota's implementation of the CAA. Any such person must disclose potential conflicts of interest, including the cause of the conflict, in writing to a superior. Conflicts of interest are defined broadly to include any divided loyalty, any conflict between the duties of the person and the person's self or other interest, and any interest, influence, or relationship that might conflict or even appear to conflict with the best interests of the Department of Health or the State, or that might affect the person's working judgment or loyalty. For the same reasons discussed in detail in our September 17, 2012 notice, we propose to find that these procedures provide adequate disclosure of potential conflicts of interest within the meaning of subsection 128(a)(2).

In summary, EPA proposes to approve North Dakota's April 8, 2013 submittal into the SIP to meet the requirements of section 128 of the Act. We also propose to approve North Dakota's infrastructure SIP with respect to the requirements of Section 110(a)(2)(E)(ii) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

8. **Stationary source monitoring system:** Section 110(a)(2)(F) requires "(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to the Act, which reports shall be available at reasonable times for public inspection."

a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite the NDAC 33-15-14-02.9, NDAC 33-15-14-03.6, and NDAC 33-15-14-06.5 which require monitoring of emissions from stationary sources. In addition, the State cites NDCC 23-25-03 which provides the statutory authority for monitoring.

b. **EPA Analysis:** NDCC section 23–25–03.10 generally requires monitoring, recordkeeping, and reporting for owners and operators of regulated sources. North Dakota's SIP-approved minor source and PSD programs provide for monitoring, recordkeeping, and reporting requirements for sources subject to minor and major source permitting. North Dakota's SIP therefore meets the requirements of section 110(a)(2)(F) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

9. **Emergency powers:** Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs.

a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite NDAC 33-15-11 (Prevention of Air Pollution Emergency Episodes), which provides the means to implement emergency air pollution episode measures and is authorized by NDCC 23-25-03. In addition, the State cites NDCC 28-32-32 and NDCC 28-25-08, which grant the Department authority to take action in an emergency.

b. **EPA analysis:** NDAC 33–15–11 and SIP Chapter 5 provide the State with general emergency authority comparable to that in section 303 of the Act. In our 2009 guidance for infrastructure requirements for the 2006 PM<sub>2.5</sub> NAAQS, we suggested that states that had monitored and recorded 24-hour PM<sub>2.5</sub> levels greater than 140.4 µg/m<sup>3</sup>, using the most recent three years of data, should develop emergency episode plans for the areas with the monitored values. We also suggested that, if these levels had not been exceeded, states could certify that they had adequate general emergency authority to address PM<sub>2.5</sub> episodes. In this rulemaking, we view these suggestions as still appropriate in assessing North Dakota's SIP for this element. North Dakota has not monitored any values above the 140.4 µg/m<sup>3</sup> level for PM<sub>2.5</sub> for the past three years (e.g., 2009, 2010, and 2011). Since this level was not exceeded in any area of the state and the State has demonstrated that it has appropriate general emergency powers to address PM<sub>2.5</sub> related episodes, no specific emergency episode plans are necessary at this time. The SIP therefore meets the requirements of 110(a)(2)(G) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS.



10. **Future SIP revisions:** Section 110(a)(2)(H) requires that SIPs provide for revision of such plan:

- (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and
- (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the [SIP] is substantially inadequate to attain the [NAAQS] which it implements or to otherwise comply with any additional requirements under this [Act].

a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite the NDCC 23-25-03.8 which formulates and promulgates emission control requirements for the prevention, abatement and control of air pollution in the state. In addition, the State also cites Section 3.5 of the SIP which commits the Department to a revision of the control strategy as needed.

b. **EPA analysis:** EPA approved relevant sections of the North Dakota SIP submitted to EPA April 6, 2009 on September 17, 2012 (77 FR 57029). NDCC section 23–25–03 provides adequate authority for the Department of Health to carry out such revisions. EPA therefore finds that the State has sufficient authority to meet the requirements of 110(a)(2)(H).

11. **Consultation with government officials, public notification, PSD and visibility protection:** Section 110(a)(2)(J) requires that each SIP “meet the applicable requirements of section 121 of this title (relating to consultation), section 127 of this title (relating to public

notification), and part C of this subchapter (relating to PSD of air quality and visibility protection).”

a. **North Dakota's response to this requirement:** Consultation with government officials:

The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite the public participation procedures in the NDAC 33-15-14-02.6 for preconstruction review for minor sources. In addition, the State cites paragraph (q) of NDAC 33-15-15-01.2 for sources subject to PSD review. Consultation with Federal Land Managers (FLMs) for PSD projects is accomplished in accordance with 40 CFR 52.21 (p) which is incorporated by reference into NDAC 33-15-15-01.2. For enforcement orders, the requirements of NDCC 23-25-08 and NDCC 28-32 are followed. Consultation with other government agencies is addressed in Chapter 10 of the SIP.

Public notification: The State cites the ND SIP Section 6.9 which commits the Department to notification of the public during ambient air quality standard exceedances. The authority for this notification is found in NDCC 23-25-06. In addition, NDAC 33-15-11-03.1 requires the Department to notify the public during air pollution emergencies.

PSD and visibility protection: The State cites adoption of the Federal PSD rule by reference as they exist on August 1, 2007 and July 2, 2012. The Department is in the process of adopting the PSD rules as they exist on July 1, 2012. This will incorporate all existing requirements for PM<sub>2.5</sub>. The “Tailoring Rule” for greenhouse gases has been adopted into North Dakota PSD rules (April 2011) and PSD applicants must address applicable requirements for greenhouse gases.

Additionally, the State has a SIP in place to address visibility for major source (PSD) permitting (NDAC 33-15-15), specific visibility impairment (RAVI), and plume blight (NDAC 33-15-19).

b. **EPA Analysis:**

The State has demonstrated that it has the authority and rules in place to provide a process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any Federal Land Manager having authority over federal land to which the SIP applies, consistent with the requirements of CAA section 121. EPA previously approved portions of the North Dakota SIP as meeting the requirements of CAA section 127 (45 FR 53475, Aug. 12, 1980).

As discussed above, the State has a SIP-approved PSD program that (for the most part) incorporates by reference the federal program at 40 CFR 52.21. These revisions are located in chapter 33-15-15-01.2 of the NDAC. EPA has further evaluated North Dakota's SIP-approved PSD program in this proposed action under IV.3, element 110(a)(2)(C). As stated there, with the approval of the PM<sub>2.5</sub> increments into the North Dakota SIP, the SIP-approved PSD program meets all relevant requirements for the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

Finally, with regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the Act. In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus, we find that there are no applicable visibility requirements under section 110(a)(2)(J) when a new NAAQS becomes

effective. In conclusion, the North Dakota SIP meets the requirements of section 110(a)(2)(J) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

12. **Air quality and modeling/data:** Section 110(a)(2)(K) requires that each SIP provide for:

- (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a [NAAQS], and
- (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite Section 7.7 of the ND SIP which addresses air quality modeling. Modeling for minor sources is addressed in NDAC 33-15-14-02.4 and modeling for major PSD sources in 40 CFR 52.21(k), (l), (m), (n) and (o) as incorporated into NDAC 33-15-15-01.2. NDCC 23-25-03 provides authority for requiring modeling.

b. **EPA Analysis:** North Dakota's SIP meets the requirements of CAA section 110(a)(2)(K) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS. In particular, North Dakota's PSD program requires estimates of ambient air concentrations be based on applicable air quality models specified in Appendix W of 40 CFR part 51, and incorporates by reference the provision at 40 CFR 52.21(l)(2) requiring that modification or substitution of a model specified in Appendix W must be approved by the Administrator. As a result, the SIP provides for such air quality modeling as the Administrator has prescribed.

13. **Permitting fees:** Section 110(a)(2)(L) requires SIPs to:

require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this act, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the

Administrator's approval of a fee program under [title] V.

a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite NDAC 33-15-23 which establishes fees for processing Permit to Construct applications, annual operating fees for minor sources, and fees for major sources under the Title V Permit to Operate program. NDCC 23-25-04.2 provides authority for the fees.

b. **EPA Analysis:** North Dakota's submittal meets the requirements of CAA section 110(a)(2)(L) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS. Final approval of the title V operating permit program became effective June 17, 1999 (64 FR 32433). As discussed in that approval, the State demonstrated that the fees collected were sufficient to administer the program. In addition, the SIP contains fee provisions for construction permits (NDAC 33-15-23-02), including costs of processing not covered by the application fee.

14. **Consultation/participation by affected local entities:** Section 110(a)(2)(M) requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP.

- a. **North Dakota's response to this requirement:** The State's 1997 and 2006 PM<sub>2.5</sub> submissions cite the ND SIP, Chapter 10 which addresses the consultation process the Department will use to coordinate with local political subdivisions that are affected by any SIP revisions, and NDCC 23-25-03 which also requires consultation. The State also cites NDCC 23-25-02.6 (public notice).
- b. **EPA Analysis:** North Dakota's submittal meets the requirements of CAA section 10(a)(2)(M) for the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

## **VI. What Action is EPA Taking?**

In this action, EPA is proposing to approve the following infrastructure elements for the 1997 and 2006 PM<sub>2.5</sub> NAAQS: (A), (B), (C) with respect to minor NSR and PSD requirements, (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). We are proposing to approve (D)(i)(II) with respect to PSD requirements for the 2006 PM<sub>2.5</sub> NAAQS. EPA is also proposing to approve a portion of the State's January 24, 2013 submittal revising the State's PSD program: specifically, the incorporation by reference of 40 CFR part 52, section 21, paragraphs (b)(14)(i),(ii),(iii), (b)(15)(i),(ii), and paragraph (c) as those paragraphs existed on January 1, 2012. Additionally, EPA is proposing to approve the April 8, 2013 submittal of revisions to Chapter 2, Section 2.15 into the North Dakota SIP. Finally, EPA will act separately on infrastructure element (D)(i)(I) for the 2006 PM<sub>2.5</sub> NAAQS.

## **VII. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations (42 USC 7410(k), 40 CFR 52.02(a)). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided

that they meet the criteria of the CAA. Accordingly, this proposed action merely approves some state law as meeting federal requirements and disapproves other state law because it does not meet federal requirements; this proposed action does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 USC 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 USC 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999); is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 USC 272 note) because application of those requirements would be inconsistent with the CAA; and,
- Does not provide EPA with the discretionary authority to address, as appropriate,

disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Greenhouse gases, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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Dated: May 2, 2013

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Howard M. Cantor

Acting Regional Administrator

Region 8